89-1149

Supreme Court, U.S.
FILED
DEC 11 1989
JOSEPH F. SPANIOL, JR.
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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

COY R. GROGAN and
JOHN H. HENSON, Petitioners,

V.

FRANK J. GARNER, JR., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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83 p

QUESTION PRESENTED

1. Must exceptions to discharge under Bankruptcy Code Section 523(a) be proven by the "preponderance of the evidence" standard or by the "clear and convincing evidence" standard?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT
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JOHN H. HENSON,
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V.

FRANK J. GARNER, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Coy R. Grogan and John H. Henson respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 9, 1989.

OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit denying rehearing has not been reported. It is reprinted in the appendix hereto, p. 42a, infra.

The opinion of the Court of Appeals for the Eighth Circuit has been reported at 881 F.2d 579. It is reprinted in the appendix hereto, p.1a, infra.

The decision of the United States District Court for the Western District of Missouri (Whipple, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 16a, infra.

The Memorandum of Opinion and Order of the Bankruptcy Court for the Western District of Missouri (Koger, B.J.) has not been reported. It is reprinted in the appendix hereto, p.30a, infra.

JURISDICTION

The judgment of the Eighth Circuit

Court of Appeals, in respondent's favor, was entered August 9, 1989. The Eighth Circuit Court of Appeals denied a timely petition for rehearing on September 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

11 U.S.C. 523. Exceptions to Discharge.

As its provisions are lengthy, the pertinent text of this statute is set forth in the appendix hereto, p. 43a, infra.

STATEMENT OF THE CASE

Petitioners originally brought suit against respondent in the United States District Court for the Western District of Missouri. In that action, a jury determined that respondent had: 1) committed common law fraud, under Missouri law; 2) breached the fiduciary duty he owed to petitioners; and 3) violated section 10(b) of the Securities and Exchange Act of 1934.

The jury awarded actual damages on the above three counts and punitive damages on the fraud count.

The Eighth Circuit Court of Appeals affirmed the jury's judgment and award.

On October 21, 1985, respondent filed a Petition for Relief under Chapter 11 of the Bankruptcy Code, requesting that petitioners' judgment against him be discharged.

On May 7, 1986, petitioners filed a complaint in bankruptcy court which sought a determination that respondent's judgment debt was nondischargeable under 11 U.S.C. § 523. At the trial of this matter before Bankruptcy Judge Frank W. Koger, petitioners offered the following four

exhibits to prove, by collateral estoppel, that the judgment debt owed petitioners was nondischargeable:

1) A copy of petitioners' first amended complaint;

2) A copy of respondent's addendum to his brief to the Eighth Circuit Court of Appeals, containing the jury instructions, the verdict director, the jury verdict and the District Court judgment;

3) The opinion of the Eighth Circuit Court of Appeals; and,

4) A letter from the Eighth Circuit Court of Appeals transmitting the opinion.

Petitioners' then rested their case. Respondent presented evidence by his testimony, denying any wrongdoing whatsoever.

The Bankruptcy Court, citing Brown v. Felsen, 442 U.S. 127 (1979) as authority, concluded that "the elements to be proved under Section 523(a)(2) must be compared with the elements decided by the unanimous jury in the District Court case, and, if identical, as to content and standard, [petitioners] have borne their burden." See p. 36a, infra.

After comparing the elements to be proved under Section 523(a)(2) to the elements decided by the jury in the District Court case, as embodied in the record before it, the Bankruptcy Court concluded the elements were the same. Id. at 37a.

Further, the Bankruptcy Court addressed respondent's contention that in the District Court trial a "preponderance of the evidence" standard was applied, that a "clear and convincing evidence" standard should be

applied under section 523 and that the two standards are totally dissimilar. The Bankruptcy Court rejected respondent's contention concluding that "there is no real distinction between 'preponderance of the evidence' and 'clear and convincing' as regards Section 523 litigation." See p. 40a, infra.

Thus, the Bankruptcy Court, having determined the issues had been fully litigated and properly decided using identical standards, applied collateral estoppel to bar relitigation of the dischargeability issues.

Respondent appealed the Bankruptcy Court decision to the United States District Court for the Western District of Missouri.

District Court Judge Dean Whipple, in affirming the Bankruptcy Court's decision in petitioners' favor, stated that,

> Both sides were permitted to try their case in full, the jury was instructed to render a verdict based upon the facts and the law given in the court's instructions. A re-litigation of this case in Bankruptcy Court on the identical fact issues would be to permit the party who loses at a jury trial to have a second day in court on the same issue he and his opponent were fully heard previously. If permitted, all like cases would result in duplicitous litigation resulting in an unreasonable burden on the bankruptcy court.

See p. 28a, infra.

Following the ruling of the District Court, respondent appealed to the Eighth Circuit Court of Appeals, seeking a holding that the jury's determination of fraud should have no preclusive effect on the subsequent bankruptcy proceeding under Section 523(a).

The Eighth Circuit determined that, in the underlying case, the District Court had applied Missouri substantive law and instructed the jury that the burden of proof for fraud is the preponderance of the evidence. See p. 8a, infra.

In examining the burden of proof under Section 523(a), the Eighth Circuit noted in its opinion that the Circuit Courts, and the bankruptcy courts, are in conflict on this issue. Furthermore, the Eighth Circuit stated that "[t]he burden of proof for fraud or any of the other exceptions from discharge under Section 523(a) of the Bankruptcy Code is far from clear. The Bankruptcy Code is silent as to the burden of proof necessary to establish an exception to discharge under section 523(a), including the exception for fraud." Id. at 9a.

Despite the noted conflict in the Circuit Courts and the Bankruptcy Code's silence on the issue, the Eighth Circuit determined that the burden of proof under Section 523(a) is "clear and convincing evidence" and reversed the decision of the District Court. See p. 14a infra.

REASONS FOR GRANTING THE WRIT

I

The Eighth Circuit's decision that the exceptions to discharge under Bankruptcy Code Section 523(a) require proof by the "clear and convincing evidence" standard is in error and is not supported by the statutory language, or by the legislative history, and is in direct conflict with decisions of the Fourth Circuit and other Courts.

Section 523(a), which contains the exceptions to discharge and their elements, makes no mention of the standard of proof that is to be applied in

dischargeability proceedings. The legislative history on § 523(a) is scant and likewise contains no reference to the proper standard of proof. See 1978 U.S. Code Cong. & Ad. News 5787, 6453.

The Bankruptcy Courts themselves are split on the issue of whether the proper standard of proof is "preponderance of the evidence" or "clear and convincing evidence". Compare In re Shepherd, 56 B.R. 218, 221 (W.D. Va. 1985); In re Boren, 47 B.R. 293, 295 (Bankr. W.D. Ky. 1985); In re Baiata, 12 B.R. 813, 817 (Bankr. E.D. N.Y.1981); Sweet v. Ritter Finance Company, 263 F. Supp. 540, 543 (W.D. Va. 1967) (applying preponderance of the evidence standard) with In re Peoni, 67 B.R. 288, 290 (Bankr. S.D. Ind. 1986); Matter of Wintrow, 57 B.R. 695, 703 (Bankr. S.D. Ohio 1986); In re

Capparelli, 33 B.R. 360, 366 (Bankr. S.D. N.Y. 1983) (applying clear and convincing evidence standard).

The Circuit Courts are also in direct conflict on which standard is correct.

The Fourth Circuit has determined that the "preponderance of the evidence" standard should be applied. Combs v. Richardson, 838 F.2d 112 (4th Cir. 1988). In Combs, as in the instant case, the Court addressed the preclusive effect of a civil jury verdict in a subsequent bankruptcy proceeding. The Bankruptcy Court had determined that a jury verdict of assault against Combs prevented him from relitigating the issue of whether the judgment was grounded in a willful and malicious injury. Therefore, the bankruptcy court determined, Combs' debt to Richardson was nondischargeable under Section 523(a)(6) which states

that: "(a) A discharge under Section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt---(6) for willful and malicious injury by the debtor to another entity or to the property of another entity."

In affirming the decision of the bankruptcy court and dismissing Combs' contention that the "clear and convincing evidence" standard should be applied to dischargeability proceedings, the Fourth Circuit stated that:

> The Bankruptcy Code is silent as to the standard of proof necessary to establish the exceptions to discharge in § 523. In the face of this silence, courts may not imply a higher standard than the preponderance standard normally applied in civil proceedings. Although the 'fresh start' philosophy of bankruptcy law requires that exceptions to discharge 'be confined to those plainly expressed,' Gleason v. Thaw, 236 U.S. 558, 562, 335 S.Ct. 287,

> 289, 59 L.Ed. 717 (1915), this policy does not justify judicial imposition of a heavier burden of proof on creditors seeking to have a debt determined nondischargeable under § 523(a)(6).

Combs, 838 F.2d at 116.

Four other Circuits are in conflict with the Fourth Circuit and have concurred with Eighth Circuit by holding that the standard of proof for discharge under section 523(a) is "clear and convincing evidence". In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985); In re Black, 787 F.2d 503, 505 (10th Cir. 1986); Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1262 (11th Cir. 1988) and In re Hunter, 780 F.2d 1577, 1262 (11th Cir. 1986). However, the Eighth Circuit has noted the meager nature of the authority these various circuits have cited for requiring the more stringent standard of proof:

The circuits applying the clear and convincing standard have offered various explanantions. All the circuits cite to various bankruptcy court decisions applying the clear and convincing standard. Two of the circuits cite to 3 Collier on Bankruptcy, ¶523.08 (15th Ed. 1989) which states without explanation that the appropriate burden of proof is the clear and convincing standard. In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Black, 787 F.2d 503, 505 (10th Cir. 1986). Two of the circuits state that the clear and convincing standard is necessary to overcome the presumption of innocence. In re Black, 787 F.2d 503, 505 (10th Cir. 1986); In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986). Three circuits offer no rational at all for favoring the more stringent standard. Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1262 (11th Cir. 1988); In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985).

See p. 11a-12a, infra.

The Eighth Circuit itself, in the instant case and in Matter of Van Horne, 823 F.2d 1285 (8th Cir. 1987), relies heavily upon the "fresh start" policy of the Bankruptcy Code for its determination that the "clear and convincing evidence" standard is the proper standard of proof under § 523(a). This "fresh start" policy provides for "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," Brown v. Felsen, 442 U.S. at 128, quoting, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

Here, the "fresh start" policy has been misapplied. By attempting to apply this policy to Section 523(a), the Eighth Circuit has failed to give effect to the rule that "[b]y seeking discharge, however, respondent placed the rectitude of his prior dealings

squarely in issue, for, as the Court has noted, the Act limits [the 'fresh start'] opportunity to the 'honest but unfortunate debtor,' Brown v. Felsen, 442 U.S. at 128, quoting, Local Loan Co. v. Hunt, 292 U.S. at 244.

Respondent has been found guilty of common law fraud. Surely such a determination would preclude him from being termed an "honest but unfortunate debtor." Therefore, the "fresh start" policy favored by the Eighth Circuit should not extend to respondent, thus alleviating any need to enforce a standard of proof more stringent than "preponderance of the evidence."

II.

The Eighth Circuit's decision that the exceptions to discharge under Bankruptcy Code Section 523(a) require proof by the "clear and convincing evidence" standard is in error and, if unchanged, will eliminate the use of

collateral estoppel on the issue of dischargeability in those states which allow the enumerated discharge provisions to be proven by a preponderance of the evidence.

As noted above, there is no statutory or legislative history support for the imposition of the "clear and convincing evidence" standard on dischargeability proceedings under Section 523(a). The Circuit Courts, by applying this more stringent standard, absent legislative authority, to Section 523(a) proceedings have, in effect, created a new statutory element. Legislative drafting is obviously not within the purview of the judical branch.

Issues of fact in civil cases are ordinarily required to be determined by the preponderance of the evidence. 37 Am Jur. 2d § 468. In addition, many states allow fraud to be proved in a civil case by a preponderance of the

evidence, "the same as any other material fact in such a case." Id. Missouri is such a state.

Other states require fraud to be determined by "clear and convincing evidence". Id. Still other states require a showing of "clear and convincing evidence" in some fraud actions and accept a showing of a "preponderance of the evidence" in other fraud actions. Id.

Furthermore, courts have held that terms such as "clear and convincing", "clear and positive", "clear, cogent and convincing", "strong, clear and convincing", et cetera, "mean only that there must be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime, and, while the evidence must be clear and convincing,

such clear and convincing proof may be met by a preponderance of the evidence." 37 C.J.S. Fraud § 114.

Thus, it is evident that different standards are applied by the various states and often the same terminology may have a different effective meaning depending upon which jurisdiction interprets such terminology. These differing standards and interpretations support the contention that the bankruptcy courts should not impose a higher standard of proof on Section 523(a) proceedings absent clear legislative authority.

If it is determined that Section 523(a) requires proof by a "clear and convincing evidence" standard, such a determination would negate prior civil determinations, in those states which adhere to the "preponderance of the evidence standard", and require a retrial in full before the bankruptcy

court to determine issues of dischargeability. Obviously, collateral estoppel could not be utilized if it is determined the later proceeding calls for a higher standard of proof.

Such a determination would place tremendous strain upon the resources of bankruptcy courts across the nation. The large volume of cases tried each year by bankruptcy courts would be increased substantially due to the removal of collateral estoppel as a means by which to prove dischargeability or non-dischargeability.

The judicial policy in favor of collateral estoppel is clear and its applicability to dischargeability proceedings under § 523(a) (formerly Bankruptcy Act § 17) is undeniable. Brown v. Felsen, 442 U.S. at 139. As this Court has stated: "If in the course of adjudicating a state law

question, a state court should determine factual issues using standards identical to those of § 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court." Id.

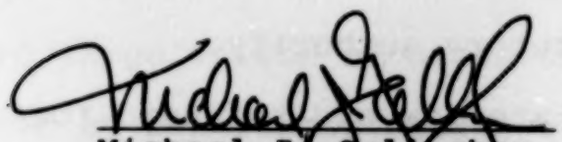
Therefore, due to the lack of contrary statutory authority, applicable state law and the need for judicial economy, a determination should be made that the "preponderance of the evidence" standard is applicable to dischargeability proceedings under section 523(a) of the Bankruptcy Code.

The determination of this Court is needed to resolve the conflict extant in the Circuit Courts of Appeals and to provide such courts guidance on this issue.

CONCLUSION

For these reasons, this Petition for Certiorari should be granted. If petitioners are correct in urging that the Eighth Circuit applied the wrong standard of proof, the decision of the District Court should be reinstated.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 88-1991

In Re: Frank J. Garner, Jr.	*
	*
Debtor.	*
	*
John R. Henson and Coy R. Grogan,	*
	*
Appellees,	*
	*
V.	*
	*
Frank J. Garner, Jr.,	*
	*
Appellant.	*

Appeal from the United States District Court for the Western District of Missouri

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Submitted: December 13, 1988

Filed: August 9, 1989

Before HEANEY* and FAGG, Circuit Judges, and HANSON,** Senior District Judge.

HEANEY, Circuit Judge.

This case addresses the preclusive effect of an earlier civil jury determination of fraud on a subsequent bankruptcy proceeding under section 523(a) of the Bankruptcy Code. The bankruptcy court held that the earlier trial precluded redetermination of the issue of fraud, and the district court adopted the bankruptcy court's view. We reverse because the earlier proceeding used a lesser standard of proof.

I. BACKGROUND

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* The Honorable Gerald W. Heaney assumed senior status on December 31, 1988.

** The HONORABLE WILLIAM C. HANSON, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

The underlying case was tried before a jury in United States District Court for the Western District of Missouri. The jury found that Frank Garner had committed common law fraud; breached a fiduciary duty owed to the appellees; and violated section 10(b) of the Securities and Exchange Act of 1934. The jury awarded actual damages on all three counts and punitive damages on the fraud count. Garner appealed to this Court. We affirmed but reduced the amount of damages recovered. Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986).

On October 21, 1985, the appellant filed a petition for relief under Chapter 11 of the Bankruptcy Code and listed the above judgment as a dischargeable debt. On May 7, 1986, the appellees filed an application for an exception to discharge, alleging

that the judgment was a debt obtained by fraud under 11 U.S.C. §523(a)(2). At trial in the bankruptcy court, the appellees presented, inter alia, the jury verdict, the district court's judgment in their favor, and rested. The appellant testified that he had not committed a fraud. The bankruptcy court ruled that the fraud issue had been litigated to a valid and final judgment at the earlier jury trial and, therefore, the debtor was collaterally estopped from relitigating the fraud issue. For this reason, the bankruptcy court ruled that the judgment against the appellant was nondischargeable under section 523(a)(2)(A).

The debtor contended below that, while the same elements were applied, a lesser standard of proof was used in the initial fraud proceeding than is required to prove fraud under federal

bankruptcy law.[1] Specifically, the creditors were permitted to establish fraud, at the first trial, by the preponderance of the evidence. At a dischargeability proceeding in

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[1] While the standard of proof may differ, a careful examination of state law and the jury instructions used in this case reveals that the elements of fraud for Missouri common law purposes and federal bankruptcy purposes are the same. For the elements of fraud under federal law, see Sweet v. Ritter Fin. Co., 263 F. Supp. 540 (W.D. Va. 1967). Both require a representation that was false and that the person committing the fraud had knowledge of the falsity. In addition, both require that the person asserting fraud materially relied on the representation and that this reliance proximately caused damage. The identical substantive issues were thereby resolved. The other requirements for collateral estoppel are also present. The issue of fraud was actually litigated and was not part of a stipulated, consent or default judgment. The underlying judgment was final and valid. The termination of fraud was essential to that judgment.

bankruptcy, one must establish the elements of fraud, the appellant argues, by clear and convincing evidence. Thus, the appellant argues that he is entitled to a new trial on the issue of fraud.

II. DISCUSSION

In Brown v. Felsen, 442 U.S. 127, 139-40 (1979), the Supreme Court concluded that the exclusive jurisdiction granted to bankruptcy courts to resolve questions of dischargeability under section 17a(2) of the Bankruptcy Act also prevented the application of claim preclusion -- res judicata -- to resolve questions of dischargeability[4] In footnote 10 of Brown v. Felsen, the

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2 Section 17 of the Bankruptcy Act was replaced by section 523 of the Bankruptcy Code, but the two provisions are substantially the same. Brown v. Felsen, 442 U.S. at 129 n.1.

Supreme Court suggested that issue preclusion -- collateral estoppel -- could still be applied in a later dischargeability proceeding. "If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of §17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court." Id. at 139 n.10.

A. Burden of Proof Applied in the Underlying Case

In the underlying case, the federal district court applied Missouri substantive law. In deciding whether the debtor had defrauded his creditors, the court instructed the jury as follows:

> In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden of causing you to believe a proposition of fact is

> upon the party who relies upon that proposition. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Upon review of this instruction, along with the other instructions, we conclude that the district court instructed the jury that the burden of proof for fraud is the preponderance of evidence. The appellant did not object to this instruction. The jury returned a verdict finding that Garner had committed fraud. The trial court rejected the appellant's post-trial motions. We affirmed concluding, inter alia, that there was substantial evidence to support a finding of fraud. Grogan v. Garner, 806 F.2d at 836.

B. Burden of Proof under Section 523(a) of the Bankruptcy Code

The burden of proof for fraud or any of the other exceptions from discharge under section 523(a) of the Bankruptcy Code is far from clear. The Bankruptcy Code is silent as to the burden of proof necessary to establish an exception to discharge under Section 523(a), including the exception for fraud. Both the appellate courts and the bankruptcy courts are split as to whether the standard is clear and convincing evidence or preponderance of the evidence.

There are six circuits that have commented on the burden of proof for fraud under section 523(a).1 Chrysler Credit Corp. v. Rebhan, 842 F.2d 257, 1262 (11th Cir. 1988); Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988); Matter of Van Horne, 823 F.2d 1285,

1287 (8th Cir. 1987); In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Black, 787 F.2d 503, 505 (10th Cir. 1986); In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985). Only the Fourth Circuit has adopted the preponderance of the evidence standard. Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988).[3] We, however, have followed the majority rule and applied the clear and convincing standard. Matter of Van Horne, 823 F.2d at 1287.

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[3] Several bankruptcy courts have also applied the more lenient standard. See, e.g., In re Baiata, 12 B.R. 813, 817 (Bkrtcy. E.D. N.Y. 1981); Sweet v. Ritter Finance Co., 263 F.Supp. 540, 543 (W.D. Va. 1967).

The circuits applying the clear and convincing standard have offered various explanations. All the circuits cite to various bankruptcy court decisions applying the clear and convincing standard. Two of the circuits cite to 3 Collier on Bankruptcy, ¶523.08 (15th Ed. 1989) which states without explanation that the appropriate burden of proof is the clear and convincing standard. In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Black, 787 F.2d 503, 505 (10th Cir. 1986). Two of the circuits state that the clear and convincing standard is necessary to overcome the presumption of innocence. In re Black, 787 F.2d 503, 505 (10th Cir. 1986); In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986). Three circuits offer no rationale at all for favoring the more stringent standard. Chrysler Credit

Corp. v. Rebhan, 842 F.2d 1257, 1262 (11th Cir. 1988); In re Phillips, 804 F.2d 930, 932 (6th Cir. 1986); In re Kimzey, 761 F.2d 421, 423-24 (7th Cir. 1985). This Circuit concluded that the stricter standard was appropriate since the general policy of bankruptcy is to provide the debtor with the opportunity for a fresh start and the courts should, thereby, construe provisions of the Bankruptcy Code favoring the debtor broadly. Matter of Van Horne, 823 F.2d at 1287.

We are not persuaded to alter our view of the proper standard of proof for fraud under section 523 of the Bankruptcy Code by the arguments of the Fourth Circuit. The Fourth Circuit reasoned, in concluding that all the exceptions to discharge contained in section 523 of the Code are governed by the preponderance of the evidence stan-

dard, that the balance of the "fresh start" policy and the policies implicitly announced by Congress when it created the exceptions to discharge does not require a heightened standard of proof. Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988). We are not convinced. While the legislative history is scant on this issue, we feel that it is fair to presume that Congress was aware that the prevailing view at the time of adoption was that fraud, for both section 523 and state common law purposes, had to be proved by clear and convincing evidence. In addition, the Fourth Circuit's manner of interpretation effectively reads the "fresh start" policy out of any provision of the Code, provided that provision could be interpreted as conflicting with the "fresh start" policy. We do not believe that principles of

statutory interpretation dictate such a reading where Congress has not expressly announced a contrary result. Therefore, we continue to follow the standard set forth in Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987).

Finally, we cannot agree with the bankruptcy court and the district court that the preponderance of the evidence standard and the clear and convincing standard are the same in this context. The Supreme Court has in a recent series of cases stated that the two standards are in function and in practice different. See Price Waterhouse v. Hopkins, 109 S. Ct. 775 (1989) and cases cited therein. In this instance, the higher standard protects the "fresh start" policy. Accordingly, the decisions of the bankruptcy court and the district court are reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,

EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT
COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JOHN R. HENSON AND)
COY R. GROGAN,)
)
Plaintiffs,)
)
v.)No.87-0434-CV-W- 1
)
FRANK J. GARNER,Jr.)
)
Defendant)

ORDER

This is an appeal by the debtor, Frank J. Garner, Jr., from the Bankruptcy Court's decision that the judgment obtained against him by appellees John H. Henson and Coy R. Grogan should not be dischargeable in his bankruptcy proceeding.

The damage case was originally tried before a jury in the United States District Court for the Western District of Missouri. The jury found that appellant Frank J. Garner had committed common law fraud; breach of fiduciary duty

owed to appellees John H. Henson and Coy R. Grogan; and that he violated Section 10(b) of the Securities and Exchange Act of 1934. The jury awarded appellees actual damages on all three counts and punitive damages on the fraud count. The jury's judgment and award was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit at 806 F.2d 829.

The Bankruptcy Court, after hearing the evidence presented on the issue of dischargeability of the judgment, found that the fraud issue had been litigated in the U.S. District Court and that the debtor should be collaterally estopped from relitigating the issues behind the judgment obtained by appellees in the U.S. District Court.

On October 21, 1985, the appellant filed his petition for relief under

Chapter 11 of the Bankruptcy Code and listed the judgment obtained against him by appellees, as a dischargeable debt under the Bankruptcy Code.

On May 7, 1986, in appellees filed their complaint for determination that their judgment debt was non-dischargeable pursuant to 11 U.S.C. § 523(a)(2). Trial on the dischargeability issue was held on January 6, 1987, at which time the appellees introduced no testimony but did offer four exhibits, to-wit: (1) a copy of appellees' first amended petition (Exhibit #1); (2) a copy of the addendum to appellant's brief filed with the Eighth Circuit Court containing instructions to the jury, and the verdict directors as well as the jury verdict and the district court's judgment (Exhibit #2); (3) the opinion of the Eighth Circuit Court of Appeals affirming the appellee's judgment against

appellant (Exhibit #3); and (4) a letter from the Eighth Circuit transmitting the opinion (Exhibit #4).

Appellant then presented evidence by his testimony, denying any wrongdoing whatsoever.

After the filing of post-trial briefs, the Bankruptcy Court by way of a memorandum opinion and order, ruled that the identical issues had been tried in the U.S. District Court jury trial that the Bankruptcy Court tried, and that collateral estoppel should apply, thus making appellees' district court judgment against appellant non-dischargeable under § 523(a)(2)(A).

The Bankruptcy Court in its opinion found for the purposes of determining the dischargeability of a debt under § 523, there is no real distinction between the "preponderance of the

evidence" and "clear and convincing evidence" burden of proof standards.

Appellees appeal this ruling of the Bankruptcy Court.

The issue raised by the appellant on appeal and to be taken up by this court is whether or not the burden of proof to prove common law fraud and the burden of proof standard required to be utilized by the Bankruptcy Court in a dischargeability suit are the same standard or are they sufficiently different as to require a bankruptcy court to relitigate the issues tried before the District Court jury.

Standard of Appellate Review

The findings of fact made by the Bankruptcy Court are not to be set aside unless they are clearly erroneous. Bankruptcy Rule 8013. The Bankruptcy Court's conclusions of law

are to be given de novo review. In re Newcomb, 744 F2d 621, 625 (8th Cir.1985).

Findings

The Bankruptcy Court, in its amended memorandum opinion and order found that the identical factual issues tried and decided by a unanimous jury in the district court case were the same facts required to be determined by the Bankruptcy Code to determine if a debt had been obtained by fraud and thus not dischargeable.

The Bankruptcy Court then determined that the issues had been fully litigated and properly decided using identical standards, and collateral estoppel applied to bar relitigation of those issues in the Bankruptcy Court, as stated in Brown v. Felsen, 442 U.S.

127, 60 L.Ed.2d 767, 99 S.Ct. 2205 (1979).

The Bankruptcy Court in its memorandum makes reference to the discussion in footnote 6 by Judge Stewart of the In re: Curl case, analyzing how the apparent conflict as to the two standards of the burden of proof have arisen. In re Curl, 49 B.R. 302 (Bankr. W.D. Mo. 1985). This court agrees with the memorandum and finding of the Bankruptcy Court that for purposes of litigation under § 523 of the Bankruptcy Court to determine dischargeability of debts, there is no difference in the standard to apply.

This court will therefore affirm the finds of the Bankruptcy Court in regard to that issue.

This court will further affirm the judgment by finding that the standard of proof becomes more of an exercise in semantics for the courts and has no distinguishable feature that can be pointed out to a jury as to how a factual issue is to be decided by them.

Appellant argues that the burden of proof used in the underlying jury trial before the U.S. District Court is the common law burden of proof of the "preponderance of the evidence."

This court, in reviewing the Bankruptcy Court file, notes that Exhibit 2 introduced by appellants, does not have Missouri Approved Instruction 3.01 (burden of proof instruction) as a part of the exhibit and this court must therefore assume as indicated in the briefs of the appellant, that the standard MAI 3.01 burden of proof instruction was used, to-wit:

3.01 [1981 Revision]

Burden of Proof--General

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden of causing you to believe a proposition of fact is upon the party whose claim [or defense] depends upon that proposition. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Obviously the words "preponderance of the evidence" are not used anywhere in this instruction.

To understand the intent and purpose of the MAI 3.01 Burden of Proof instruction, it is necessary to read the 1963 Report to the Missouri Supreme Court at page xxxvii in the MAI Approved Instructions, 3rd Edition. A reading of that report advises the reader that the intent of the burden of proof instruction is to simply and accurately tell the

jury what is meant by burden of proof and to use such terms as "preponderance," or "greater weight" in an instruction without some further explanation, could be understood by a jury as requiring proof which removes all doubt. It goes on to say, "after studying decisions of nearly every court in the country, we concluded that attempts to explain universally adds to the confusion." It is obvious from a reading of this report that the M.A.I. drafting committee ran into the same problem that is facing this court today and has faced courts throughout the land. It appears that the Committee's intent was to try to resolve this semantic jungle by merely attempting in as simple language as possible to tell the jury the person seeking to recover must prove the proposition of fact on which the party relies. Thus it appears to

this court that the general burden of proof instructions should not be categorized or placed in either category requiring a "preponderance of the evidence" or requiring "clear and convincing evidence", but merely requiring the parties seeking recovery in a jury trial to put forth evidence to convince the triers of the fact that they are entitled to recovery.

In making these findings, the court is mindful of the fact that there are MAI burden of proof instructions for specific types of cases in which the instructions use the language "clear and convincing." The use of these burden of proof instructions arose from curt decision or statutory requirements, to-wit: (1) in cases whether there is a question as to whether or not a gift was given to a person by a decedent because that stan-

dard was set by the Missouri Supreme Court in the case of In re Passman's Estate, 537 S.W.2d 380 (MAI 3.04); (2) in libel and slander cases in which Missouri recognized the actual malice standard set forth by the United States Supreme Court case New York Times Company v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (MAI 3.05); and (3) to determine if an individual should be committed because of mental disease or defect as required by statute, § 632.475, RSMo 1986.

The keystone of our legal system is to give litigants a full opportunity to present their side of the litigation and allow a court or jury to reach a decision, and then abide by that decision.

This has been done in this case. Appellant's trial in the U.S. District Court used Missouri Civil Instructions. Both sides were permitted to try their case in full, the jury was instructed to render a verdict based upon the facts and the law given in the court's instructions. A re-litigation of this case in Bankruptcy Court on the identical fact issues would be to permit the party who loses at a jury trial to have a second day in court on the same issue he and his opponent were fully heard previously. If permitted, all like cases would result in duplicitous litigation resulting in an unreasonable burden on the bankruptcy court.

The court therefore adopts the findings of the Bankruptcy Court and incorporates them in these findings by reference, and affirms the decision of the Bankruptcy Court.

IT IS SO ORDERED.

(/s/ Dean Whipple)
Dean Whipple
U.S. District Judge

DATED: February 29, 1988.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

In Re:	)
	)
Frank J. Garner, Jr.	) Case No. 85-0375-52
Debtor	)
	)
John R. Henson & Coy R. Grogan,	)
	)
Plaintiffs,	)
	)
v.	) Adv. No. 83-183-2
	)
Frank J. Garner, Jr.,	)
	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

This adversary action by two creditors seeking to avoid discharge of debtor on their respective claims came to an abrupt halt at the conclusion of creditors' case when debtor elected to present no evidence and stood on his oral Motion for Dismissal made when the plaintiff/creditors rested. Creditors had each obtained a jury verdict against debtor in the United States District Court for the Western District of

Missouri, before the petition for reorganization was filed. Debtor had appealed the resulting judgments to the Eighth Circuit Court of Appeals. That latter tribunal affirmed the judgments post petition and this Section 523 adversary proceeding, having been timely filed, proceeded to trial. Creditors did not offer the transcript of the proceedings in the District Court case. Instead, they introduced only four exhibits and rested.

Those four exhibits were:

Exhibit 1: A copy of creditors' first amended complaint.

Exhibit 2: A copy of debtor's addendum to the brief of debtor to the Eighth Circuit, containing instructions to the jury and the Verdict Direc-

tor as well as the jury verdict and the District Court judgment.

Exhibit 3: The opinion of the Eighth Circuit Court of Appeals.

Exhibit 4: Letter from Eighth Circuit Court of Appeals transmitting the opinion.

The Court, therefore, is required to determine from the exhibits if creditors have made a case and established all elements necessary under Section 523.

The original District Court complaint is drawn in five counts. Count I alleged a common law fraud, potentially cognizable under Section 523(a)(2). Count II alleged a breach of fiduciary duty, potentially cognizable under Section 523(a)(4). Count III alleged a use of interstate instrumentality to make alleged misrepresentations. This

Count adds nothing in a bankruptcy proceeding under Section 523. Count IV alleged a RICO violation which again, adds nothing to a bankruptcy proceeding under Section 523. For the reasons stated hereafter, the Court will to consider only Count I or the common law fraud Count.

The jury instructions in Count I required the jury to find in Instruction Number 6 and Instruction Number 23 (respectively to each creditor):

First: That debtor made a representation to each creditor.

Second: That the representation was false.

Third: That the representation was material in causing each creditor's decision.

Fifth: That each creditor relied on the debtor's representation.

Sixth: That as a direct result of such representation each creditor was damaged.

Seventh: That each creditor did not discover the alleged fraud until a later date.

The jury verdict was unanimous in favor of each creditor and against the debtor on Count I, as well as two other counts. After the filing of post trial motions, the District Court ruled:

> "Here there clearly was sufficient evidence to support the jury's conclusion that defendant...intentionally defrauded plaintiffs."

The United States Court of Appeals for the Eighth Circuit unanimously affirmed and held that there was sufficient evidence to support the verdict.

Since 1970, the bankruptcy courts have been the sole arbiter of what debts are not discharged by a bankruptcy proceeding. Brown v.

Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979) tells us that: "... are the type of questions that Congress intended the bankruptcy court would resolve," (1.c. 2112). Although that opinion dealt only with a state court judgment, there is no reason to suspect that the same rule would not apply to judgments rendered in Federal Courts also. The question then becomes did the judgment in the District Court constitute so similar a finding of fraud in that action as to provide a basis for the bankruptcy court to determine that Section 523 fraud was committed thereby rendering the judgment nondischargeable, or is the debtor collaterally estopped from relitigating those issues of fact determined by a prior finding thereon. Again Brown v. Felsen Id. footnote 10, page 2213, supplies the answer. "If in the course of

adjudicating a state-law question, a state court should determine factual issues using standards identical to those of Section 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court." Thus, the Court is led to the conclusion that the elements to be proved under Section 523(a)(2) must be compared with the elements decided by the unanimous jury in the District Court case, and, if identical, as to content and standard, creditors have borne their burden.

Under Section 523(a)(2) those elements are:

(1) Utterance or issuance of a representation,

(2) Proof of the falsity of the representation,

(3) Proof of knowledge on the part of the maker of that falsity,

(4) Intent to mislead or deceive the alleged victim by the maker,

(5) Reliance on the representation by the victim,

(6) Proof that damage occurred to the alleged victim.

(See Sweet v. Ritter Finance Company, 263 F. Supp. 540 (W.D. Va. 1967).

By comparing these standards with instructions Number 6 and Number 23, it appears to the Court that very element required to be found by the Court in the dischargeability hearing was already found by the jury in the District Court verdict. Further those findings received the judicial seal of approval from the District Court in its Order of August 7, 1986, when it stated: "Here, there clearly was suffi-

cient evidence to support the jury's conclusion that defendant violated his fiduciary duty and intentionally defrauded plaintiffs." The Court of Appeals, Eighth Circuit, stated: "We find substantial evidence, as did the jury, to support proof of fraud committed by Garner against the plaintiffs."

Therefore, although this Court believes and holds that the Bankruptcy Court is the sole arbiter of Section 523 dischargeability vel non, nevertheless where identical factual issues have been fully litigated and properly decided using identical standards by courts of appropriate jurisdiction, collateral estoppel bars relitigation of those issues in this Court. This leads to the final question to be determined by this Court, i.e., were identical standards used?

In defendant's brief, the point is made that the standard in the District Court trial was "preponderance of the evidence" while the standard should be "clear and convincing" and that the two are totally dissimilar. If defendant's point is well taken, then obviously collateral estoppel does not come into play and there is insufficient evidence before the Court to determine dischargeability. The Honorable Dennis J. Stewart, Chief Bankruptcy Judge of this District, had occasion to explore this identical question in a footnote to his opinion in Matter of Curl, 49 B.R. 302 (Bkr. W.D. Mo. 1985), see footnote 6. This Court, although not bound by that ruling, frankly considers it not only the best exposition of how the apparent divergence arose, but strongly recommends that any counsel engaged in Section 523 litigation regard that

opinion (and the footnotes) as required reading for a thorough understanding of the elements of proof and the applicability of evidentiary standards. Accordingly, this Court concludes that there is no real distinction between "preponderance of the evidence" and "clear and convincing" as regards Section 523 litigation.

Inexorably then, the Court concludes that through collateral estoppel, creditors sustained the burden of proof and through their exhibits sustained the burden as to all elements of dischargeability. The judgment rendered on common law fraud which was pled in Count I of plaintiff's original complaint in Federal District Court is, therefore, ruled to be nondischargeable. No ruling is necessary on any other Count, even Count II, the alleged fiduciary breach, inasmuch

as only one recovery may be had by creditors. Although this result is in favor of creditors, the Court must point out that it believes better practice would be to introduce the transcript in such a proceeding, and that creditors in similar proceedings run a substantial risk of not presenting the Court with sufficient evidence upon which to base a ruling when they rely upon collateral estoppel alone.

SO ORDERED this 24th day of February, 1987.

(/s/ Frank Koger)
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 88-1991WM

In Re: Frank J. Garner, Jr.	*
	*
Debtor.	*
John R. Henson and Coy R. Grogan,	*
	*
Appellees,	*
	*
v.	*
	*
Frank J. Garner, Jr.,	*
	*
Appellant.	*

Appeal from the United States District Court for the Western District of Missouri

Appellees' petition for rehearing has been considered by the court and is denied.

September 12, 1989

Order Entered at the Direction of the Court:

(/s/ Robert D. St. Vrain)

Clerk, U.S. Court of Appeals, Eighth Circuit

SECTION 523 (11 U.S.C. § 523)

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required--

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and

after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing--

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within forty days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of con-

sumer credit under an open end credit plan obtained by an individual debtor on or within twenty days before the order for relief under this title, are presumed to be nondischargeable: "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act (15 U.S.C.1601 et seq.);

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution, unless--

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3),

(4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965 (20 U.S.C. 1087-3), or under section 733(g) of the Public Health Service Act (42 U.S.C. 294f) in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c) Except as provided in subsection (a)(3)(B) of this in section, the debtor shall be discharged from a debt of a kind specified paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(d) If a creditor requests a determination of dischargeability of a consumer debt under section (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except

that the court shall not award such costs and fees if special circumstances would make the award unjust.